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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/540,260	01/10/2006	Andre Roberts	03094.000120.	8667

5514 7590 05/04/2010

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EXAMINER	
BEKKER, KELLY JO	
ART UNIT	PAPER NUMBER
1781	
MAIL DATE	DELIVERY MODE
05/04/2010	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/540,260	ROBERTS, ANDRE	
	Examiner	Art Unit	
	KELLY BEKKER	1781	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *28 January 2010*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *8-10,13,15 and 16* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *8-10,13,15 and 16* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Amendments made 1/28/10 have been entered.
Claims 8-10, 13, 15, and 16 remain pending.

Claim Rejections - 35 USC § 112

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The 112 second paragraph rejections of claims 8-16 have been withdrawn in light of applicant's amendments and arguments made January 28, 2010.

Claim Rejections - 35 USC § 102

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The 102(b) rejection of claims 8-11 and 16 as being anticipated by Bouette (US 4272558) has been withdrawn in light of applicant's amendments made January 28, 2010. Specifically, the references does not teach the gas bubble size of less than 25 microns as instantly claimed.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 8, 9, 13, 15, and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bouette (US 4272558) in view of Brown et al. (US 2002/0090437 A1).

Bouette teaches a process for making a confectionary product comprising: heating a supply of chocolate to bring it to its molten state in a mixing device and incorporating gas by stirring to form bubbles in the chocolate (Column 2 lines 9-25, Column 3 lines 24-43, and Column 4 lines 20-23 and 30-35); extruding and solidifying the chocolate (Column 2 lines 3-8 and 20-22); and coating the aerated chocolate with a non-aerated chocolate coating (Column 4 lines 53-63). Bouette teaches that the gas is incorporated into the chocolate mix by a mixing head that agitates the melted chocolate

(Figure 1, Reference characters 10 and 12, Column 3 lines 24-29 and Column 4 lines 20-23 and 30-35). By teaching that the gas is uniformly distributed throughout the chocolate, Bouette teaches that the bubbles are homogenously dispersed in the chocolate (Column 3 lines 39-40). By teaching that the gas is uniformly distributed throughout the chocolate, Bouette teaches that the bubbles are homogenously dispersed in the chocolate (Column 3 lines 39-40). Bouette teaches of controlling the size of the bubbles (Column 3 line 53 through Column 4 line 44).

Specifically regarding preparing chocolate mix in paste or liquid form from solid chocolate making ingredients and at least one fat and cooling said chocolate mix to about 29 to 31C to form a cooled chocolate, since Bouette teaches of "heating a supply of chocolate to bring it to its molten state" one of ordinary skill in the art would expect that the supply of chocolate as taught by Bouette is a cooled chocolate mix, i.e. a solid chocolate mix, that was previously prepared and cooled for storage at room temperature (about 25C which encompasses about 29-31C); and since Bouette teaches that the mix is a chocolate supply and chocolate was conventionally made from liquid chocolate mixes of fat and solid chocolate ingredients, such as milk solids and sugars, one of ordinary skill in the art would expect that the chocolate of Bouette be a prepared liquid chocolate that was formed by mixing fat and solid chocolate making ingredients, such as non-fat milk solids and sugars.

Specifically regarding the chocolate as low density chocolate, as Bouette teaches of a chocolate to which bubbles are added, the density of the chocolate taught by Bouette is lowered from its original point and thus Bouette teaches of a low density chocolate.

Specifically regarding forming the chocolate into a desired shape since Bouette teaches of extruding the chocolate and as extruding is a known method of shaping, one of ordinary skill in the art would expect that the extruded chocolate as taught by Bouette is formed into a desired shape.

Specifically regarding a sugar based shell coating as surrounding the aerated chocolate, since Bouette teaches of enrobing the aerated chocolate with a chocolate coating and chocolate was known to contain sugar, Bouette teaches that the aerated

chocolate is surrounded by a sugar based shell coating. It is noted that the definition of a shape is any various object resembling a coating.

Bouette is silent to the average maximum size of the gas bubbles as less than 25 microns as recited in claim 8 and the average diameter as about 17 microns as recited in claim 13, to the chocolate as heated and aerated in the same device as recited in claim 8, and to the confectionary product as in the form of a slab with constant thickness as recited in claim 15.

Brown et al (Brown) teaches of an aerated chocolate with a bubble diameter of preferably less than 50 microns, wherein the range of bubble diameters is from 9-82 microns (paragraphs 0034-0037 and Figure 20). Brown teaches that bubbles should not be readily detectable in the chocolate (paragraphs 0003).

Regarding the average maximum size of the gas bubbles as less than 25 microns and the average diameter as about 17 microns, it would have been obvious to one of ordinary skill in the art for the bubble size to be low, such as less than 50 microns up to 9 microns, in order for the bubbles to not be readily detectable as taught by Brown yet high enough so that the chocolate maintained an aerated effect. To adjust the bubble size was known and routine determination of one of ordinary skill in the art as taught by Bouette and to choose a particular bubble size would depend on the organoleptic properties desired in the final product.

Regarding the chocolate as heated and aerated in the same device, Bouette teaches of melting a solid chocolate and then transferring it into an aerated device, it would have been obvious to one of ordinary skill in the art at the time the invention was made for the melting and aeration of the chocolate to occur in the same device when the aerating device was capable of heating in order to form a process in which there was less equipment to clean and maintain; it would have been obvious and common sense to use one piece of machinery which could function to melt and aerate as opposed to two separate pieces of machinery. Furthermore, it is noted that to use one functionally equivalent apparatus or another would not impart a patentable distinction to the method as instantly claimed as both apparatus accomplish the same function.

Regarding the slab as having a constant thickness, confectionary chocolate products were known to be in several forms, including bars, i.e. slabs having a constant thickness. It would have been obvious to one of ordinary skill in the art for the extruded chocolate as taught by Bouette to be in the form of a slab with a constant thickness. One would have been motivated for the confection as taught by Bouette to be a slab as having a constant thickness if it was desired for the final product to resemble a candy bar. To choose an known shape of the confectionary product would be obvious and routine determination to one of ordinary skill in the art.

Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Bouette (US 4272558) in view of Brown et al. (US 2002/0090437 A1), further in view of the combination of Cully et al (US 5676995) and Beckett et al (US 2003/0118697 A1).

Bouette teaches a process for making a confectionary product as discussed above. Bouette is silent to the mixing as carried out by using a high shear rotor stator wherein the rotor moves at above about 49rpm as recited in claim 10.

Cully et al (Cully) teaches of forming a chocolate product from a chocolate source, fat, and a sweetener (abstract). Cully teaches that after liquification, high shear mixing takes place in a suitable apparatus and that a high shear mixer with a rotor stator is preferred for reasons of its simplicity of operation and design (Column 3 lines 38-60).

Beckett et al (Beckett) teaches of forming a chocolate product from a dark chocolate source, water, and milk powder (abstract). Beckett teaches that the final product has water droplets and is formed by mixing sufficient to disperse the water throughout but not so strong to form a continuous phase (paragraph 0024). Beckett teaches that a low stirring speed, for example, 50-150rpm, is used (paragraphs 0027 and 0028).

Regarding mixing as carried out by using a high shear rotor stator, it would have been obvious to one of ordinary skill in the art at the time the invention was made for the mixing device as taught by Bouette to be a high shear rotor stator in view of Cully. One would have been motivated to use the high shear rotor stator for mixing the chocolate

composition as Cully teaches that the apparatus is used for mixing chocolate and is preferred for reasons of its simplicity of operation and design.

Regarding mixing as carried out above about 49 rpm, it would have been obvious to one of ordinary skill in the art at the time the invention was made for the mixing of the chocolate as taught by Bouette to be carried out at a speed of about 50-150rpm in view of Beckett. One would have been motivated to use the speed of about 50-150rpm as taught by Beckett as Bouette teaches of a chocolate with gas bubbles and Beckett teaches that bubbles within a chocolate are dispersed but not burst/lost at a mixing speed of about 50-150rpm. To determine the appropriate mixing speed that would preserve the desired micro bubble structure of the chocolate product would have been obvious and routine determination to one of ordinary skill in the art based upon the chocolate and bubble properties.

Response to Arguments

Applicant's arguments with respect to claims 8-10, 13, 15, and 16 have been considered but are moot in view of the new ground(s) of rejection. As necessitated by applicant's amendments. The newly added claim limitations and arguments have been addressed in the rejection above.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to KELLY BEKKER whose telephone number is (571)272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lien Tran/
Primary Examiner
Art Unit 1781

/Kelly Bekker/
Examiner
Art Unit 1781